



STATE AND LOCAL TAXATION: PA SUPREME COURT INVALIDATES LOCAL SHARE ASSESSMENT LEVIED AGAINST CASINO'S SLOT REVENUE OUTSIDE PHILADELPHIA

Posted on **October 3, 2016** by **Jim Malone**



The Pennsylvania Constitution requires that taxes be uniform: “All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.” Pa. Const. art. VIII, § 1. While this provision sounds similar to the equal protection clause of the Fourteenth Amendment, in practice, it is much more robust.

On September 28, 2016, the Pennsylvania Supreme Court ruled that the local share assessment imposed under Section 1403 of the Pennsylvania Race Horse Development and Gaming Act violated the uniformity clause of the Pennsylvania Constitution because casinos were taxed differently based upon the amount of their gross revenue. *Mount Airy #1 LLC v. Pennsylvania Dep't of Rev.*, No. 34 EM 2015, 2016 Pa. LEXIS 2174, *3-*4 (Pa. Sept. 28, 2016).

Section 1403(b) of the Gaming Act imposes on each casino “a daily tax of 34% from its daily gross terminal revenue from the slot machines in operation at its facility and a local share assessment as provided in subsection (c).” 42 Pa. C.S.A. § 1403(b). Philadelphia has unique provisions governing its Local Share Assessment because it is both a city and a county. All other counties receive revenue under a system that provides for a county local share, and a municipal local share. 42 Pa. C.S.A. § 1403(c)(2) (providing county local share), (3) (providing municipal local share).

The municipal local share formula under the statute differentiates between casinos located outside of Philadelphia based upon their gross terminal revenue or GTR for the year: “[T]he Gaming Act provides that non-Philadelphia casinos with GTR below \$500 million must pay a lump sum of \$10 million municipal local share assessment. Yet for non-Philadelphia casinos with GTR greater than \$500 million, the municipal local share assessment is 2% of the casino's GTR.” *Mount Airy*, 2016 Pa. LEXIS 2174 at *11.

The Supreme Court began its analysis by noting that it had previously struck down similar taxes. The court observed that an inheritance tax had been struck down in 1899 because it exempted the first

\$5,000 of property from tax, which meant that most estates paid no tax at all. *Id.* at *11-*12 (citing *Cope's Estate*, 191 Pa. 1, 43 A. 79, 81 (1899)). Next, the court noted that it had invalidated a graduated income tax because it was not uniform. *Id.* at *12-*13 (citing *Kelley v. Kalodner*, 320 Pa. 180, 181 A. 598, (1935)). The *Mount Airy* Court then noted that income-based classifications had been held to violate the uniformity requirement in other tax cases. *Id.* at *13-*14 (citing *Sausbury v. Bethlehem Steel Co.*, 413 Pa. 316, 196 A.2d 664 (1964), and *Amidon v. Kane*, 444 Pa. 38, 279 A.2d 53, 64 (1971)).

In the Court's view, the municipal local share was "a variable-rate tax" that applied "one rate for non-Philadelphia casinos with GTR below \$500 million and another for non-Philadelphia casinos with GTR greater than \$500 million." *Id.* at *14. The fact that casinos paid different rates based on their revenues was dispositive. *Id.* at *14-*15.

Turning to the appropriate remedy, the majority concluded that both the local municipal share *and* the local county share provisions had to be severed from the Gaming Act because they were overlapping and interdependent components of a single tax. *Id.* at *23-*24. Justice Todd, disagreed with the majority's severance decision, indicating that she would have only severed the provisions governing the local municipal share. *Id.* at *28-*36 (Todd, J. concurring and dissenting). In contrast, Chief Justice Saylor took issue with the determination that the local share assessment was unconstitutional, indicating that the record required further development. *Id.* at *36-*45 (Saylor, C.J. concurring and dissenting).

Mount Airy suggests that the court remains receptive to uniformity challenges in tax cases.



By: **Jim Malone**

Jim Malone is a tax attorney in Philadelphia. A Principal at Post & Schell, he focuses his practice on federal, state and local tax controversies. [Learn more about Post & Schell's Tax Controversy Practice >>](#)

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